No. 87-897

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE INGERSOLL MILLING MACHINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN DOAR
Counsel of Record
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorney for Respondent The Ingersoll Milling Machine Company

Of Counsel:

MICHAEL S. DEVORKIN
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

QUESTIONS PRESENTED

1. Whether the courts below were erroneous in finding that petitioner Bernard provided freight forwarding services to the shipper and the ocean carrier that were maritime in character and essential to the ocean shipment of goods, and thus concluding that the freight forwarding contract was within the scope of admiralty jurisdiction?

2. Whether this Court should reach the issue of admiralty jurisdiction where there is also diversity jurisdiction and pendant party jurisdiction?

3. Whether the lower courts erred in concluding that as a matter of law or of fact an "on deck shipper's risk" bill of lading is not clean.

RULE 28.1 STATEMENT

Respondent The Ingersoll Milling Machine Company is a wholly owned subsidiary of Ingersoll International, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 STATEMENT	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. The Second Circuit's Decision is Based on an Analysis of the Maritime, Non-preliminary Character of Bernard's Work in Light of the Factual Record. It Did Not Expand the Principles of Admiralty Jurisdiction	4
II. This Case Is Not An Appropriate One For The Review Of The Principles Of Admiralty Jurisdiction, Because There Also Was Diversity and Pendant Party Jurisdiction	7
A. Diversity Jurisdiction	7
B. Pendant Party Jurisdiction	9
III. As A Matter Of Law And Of Fact, The Bill Of Lading Was Not Clean	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: PAGE

Aldinger v. Howard, 427 U.S. 1 (1976) 10

Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) 9

Boudreaux v. Puckett, 611 F.2d 1028 (5th Cir. 1980) ... 11

Calmaquip Eng. West Hemisphere Corp. v. West Coast Carrier's Ltd., 650 F.2d 633 (5th Cir. 1981) 12

DeBellas v. United States, 542 F. Supp. 999 (S.D.N.Y. 1982) 10

The Delaware, 81 U.S. (14 Wall) 579 (1874) 12

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 4, 6, 7

Hinkens Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d 411 (9th Cir. 1974) 7

Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970) 9

The Idefjord, 114 F.2d 262 (2d Cir.), *cert. denied*, 311 U.S. 707 (1940) 12

Insurance Co. v. Dunham, 78 U.S. (11 Wall) 1 (1871) .. 5

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 5

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 9, 10, 11

Lykins v. Pointer, 725 F.2d 645 (11th Cir. 1984) 11

Maltais v. United States, 439 F. Supp. 540 (N.D.N.Y. 1977) 9

Massachusetts v. Westcott, 431 U.S. 322 (1977) 7

PAGE

Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855). . . .4, 5, 7

Moor v. County of Alameda, 411 U.S. 693 (1973) 9

Morse Electro Products Corp. v. S.S. Great Pearce, 437 F. Supp. 474 (D.N.J. 1977) 10, 11

Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979) 11

Owen Equipment and Erection Company v. Kroger, 437 U.S. 365 (1978). 10

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). 5, 7

Reid v. Fargo, 241 U.S. 544 (1916) 6

St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janeiro, 263 U.S. 119 (1923) 12

The Thames, 10 F. 848 (S.D.N.Y. 1881) 5

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 9

Rules And Statutes:

28 U.S.C. § 1332(c) 8

28 U.S.C. § 1333 10

42 U.S.C. § 1983 10

46 U.S.C. § 801 6

46 U.S.C. § 841b(a). 6

46 C.F.R. Part 510. 6

Fed. R. Civ. P.
Rule 38(d) 11
Rule 39(b) 11

Fed. R. Evid., Rule 201(f) 7

PAGE

Miscellaneous:

Merchant Marine Officer's Handbook, pp. 18-26 (4th ed. 1965) 12

U.S. Code Cong. & Ad. News, pp. 2699, 2702, 2704... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-897

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE INGERSOLL MILLING MACHINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent the Ingersoll Milling Machine Company respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion of the United States Court of Appeals for the Second Circuit in this case. That opinion is reported at 829 F.2d 293 (2d Cir. 1986), and is reprinted in Petitioner's Appendix at 1a ("Pet. App. ___"). The District Court opinion is reported at 619 F. Supp. 493 (S.D.N.Y. 1985), and is reprinted in Petitioner's Appendix at 38a.

STATEMENT OF THE CASE

In August 1979, respondent The Ingersoll Milling Machine Company ("Ingersoll"), Rockford, Illinois, booked cargo with Taiwan International Line ("Taiwan") through Taiwan's Illinois agent for shipment from New Orleans to Korea. The cargo consisted of a $2.1 million special design metal working milling machine.

The District Court found that Ingersoll and Taiwan entered an oral contract of carriage for under deck stowage. (Pet. App. 49a). Although Ingersoll never gave permission for on deck stowage, seventeen of the twenty boxes were stowed on deck and were severely damaged by corrosion on arrival in Korea.

Ingersoll retained petitioner J.E. Bernard & Co. ("Bernard") to act as the freight forwarder for this shipment and instructed it to perform certain tasks relating to the voyage. The District Court found that Bernard was engaged to secure clean bills of lading and to see that Taiwan followed instructions to issue clean bills of lading. (Pet. App. 51a). Bernard was also engaged to ensure that Ingersoll's cargo would be properly loaded so that proper bills would be issued. (Pet. App. 17a). See JA 518-27, 560.[1]

Without Ingersoll's knowledge, Taiwan's agent in New Orleans marked the bills of lading "on deck shipper's risk." The courts below found that such a bill of lading is not clean. (Pet. App. 18a-19a, 50a-51a). After the ship sailed, Bernard received the bill of lading but failed to examine its copies and failed to advise Ingersoll that Taiwan had not followed instructions to issue clean bills of lading. (Pet. App. 16a-17a, 20a-21a).

As the freight forwarder on Ingersoll's shipment, Bernard performed many tasks before and after the voyage began which were essential to completion of the safe ocean voyage of

---

1 "JA" refers to the Joint Appendix filed in the Court of Appeals. "E" refers to the Exhibit volume thereof. "PX" refers to Plaintiff's Trial Exhibits.

Ingersoll's cargo. Its representative in the loading port arranged for necessary documentation to be prepared for acceptance of the cargo at the pier and coordinated the movement of Ingersoll's cargo to the pier. It also verified the loading of the cargo on the ship. JA 518-27, 560-61.

Bernard was responsible for preparing, securing and reviewing properly executed shipping documents, including the bill of lading. JA 459, 464, 488-90, 492-93, 496, 498, 506, 560-65. Bernard also paid the freight for Ingersoll, E 428, and billed Ingersoll for preparation of the bill of lading and forwarding. E 534. The Court of Appeals found that the procurement of these documents relating to a shipment by sea was "an essential and integral part of the shipping process." (Pet. App. 16a).

Furthermore, Bernard performed some tasks for the carrier. Thus, in order to receive its commission from Taiwan, Bernard certified to Taiwan that it had performed "the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for, space for such cargo," and

> "(1) The coordination of movement of the cargo to shipside; (2) The preparation and processing of the ocean bill of lading; (3) The preparation of dock receipts or delivery orders; (4) The preparation and processing of consular documents or export declarations; (5) the payment of the ocean freight charges on the cargo." PX 124.

As a result of Bernard's breach of its contract, the cargo travelled on deck and was badly damaged. (Pet. App. 20a-21a). Bernard did not provide the safe voyage which it had promised to help secure.

In July 1980, Ingersoll filed suit against Bernard, Taiwan, and Fireman's Fund Insurance Co. (its own insurance carrier) in the Northern District of Illinois, on the basis of admiralty jurisdiction. The suit was later transferred to the Southern District of New York and consolidated for trial with Ingersoll's suit against Taiwan and Excellent Marine Inc., the vessel's owner. Bernard and Taiwan cross-claimed against one another.

Although Bernard moved for summary judgment on the basis of the bills of lading, it never moved to challenge the jurisdiction of the Court or to request a jury trial. Rather, it questioned subject matter jurisdiction for the first time in its post-trial brief.

The District Court rejected Bernard's belated challenge to its jurisdiction and its argument that Bernard's work had been performed only preliminary to or after the completion of the voyage. It found Bernard's actions in preparing and processing the bill of lading and other vital documents and in paying the ocean freight were maritime in character and necessary for the shipment to Korea. (Pet. App. 54a).

The Second Circuit also rejected Bernard's jurisdictional challenge. It affirmed the District Court's finding that Bernard's work was of a non-preliminary nature, and that the tasks which Bernard agreed to perform were maritime in nature and essential to the voyage. Accordingly, it held that there was admiralty jurisdiction. (Pet. App. 16a-17a).

The lower courts also considered all of the relevant evidence offered by both sides on the subject of clean bills of lading, and rejected Bernard's claim that as a matter of law a bill of lading marked "on desk shipper's risk" is a clean bill of lading.

The Second Circuit denied Bernard's petition for rehearing with a request for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Is Based on an Analysis of the Maritime, Non-preliminary Character of Bernard's Work in Light of the Factual Record. It Did Not Expand the Principles of Admiralty Jurisdiction.

Petitioner contends that the Second Circuit's decision below conflicts with the rule of *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts are not recognizable in admiralty, with a decision of the Eleventh Circuit in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 669 (11th

Cir. 1987), and with its own decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

To the contrary, the Second Circuit carefully considered and followed *Minturn* in its factual analysis of Bernard's activities. The evidence showed, and the Court found, that Bernard's contract was not that of a general agent and that its duties were not preliminary or incidental to the ocean carriage of Ingersoll's cargo. We believe that these findings that the Second Circuit affirmed were correct.

Minturn involved a general agent's demand against its principal for a balance of accounts. The agent sought payment for money for husbanding services provided to the shipowner in paying for supplies, repairs and similar charges for the vessel. The Second Circuit did not vary from or expand *Minturn*, because Ingersoll's contract with Bernard was plainly not a general agency contract for husbanding services to a vessel, or even a general agency contract of any type.[2]

To the contrary, Bernard contracted to and did provide essential services to the shipper related to a specific ocean voyage. It coordinated the movement of cargo to the ship, had a representative in the loading port, provided key documents for the voyage, verified that the cargo was loaded, reviewed the documents after sailing and paid the freight.

Bernard argues that its services were "shoreside," and incidental or preliminary to the voyage. Bernard implies (Pet. 6), as it argued below in reliance on *The Thames*, 10 F. 848 (S.D.N.Y. 1881), that "shoreside" work is not maritime. This Court has long ago rejected the "locality test" for maritime contracts. *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 26 (1871). The boundaries of admiralty jurisdiction are conceptual. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961).

---

2 Bernard did not argue below and does not actually contend here that it had a general agency contract with Ingersoll. This is for good reason, since in order to avoid liability, Bernard has consistently argued that its contractual tasks were *de minimis*, and that it was little more than a messenger.

The Second Circuit properly focused on the character of the work as determinative, and on this factual record properly concluded that Bernard's work was essential to the ocean voyage of Ingersoll's cargo and therefore maritime.[3]

Bernard paid the ocean freight. Bernard was charged with procuring *clean* ocean bills of lading, doing whatever was necessary after the vessel sailed to review them and advising Ingersoll appropriately. Bernard was not a mere messenger. It had an affirmative obligation to secure for Ingersoll clean bills. It undertook this obligation for Ingersoll, an inland shipper, in order to insure that Ingersoll's cargo was actually and properly loaded on the vessel and that it would experience a safe ocean voyage. In seeking payment for its services, Bernard certified to Taiwan that it had coordinated the movement of the cargo to the vessel and that it had prepared and processed the ocean bill of lading. Because it was engaged to perform these tasks and "was engaged to ensure that Ingersoll's cargo would be properly loaded on board the M/V Bodena so that proper bills of lading would be issued," (Pet. App. 17a), the courts below properly concluded that Bernard and Ingersoll had a maritime contract which supported admiralty jurisdiction.

Bernard wrongly asserts that there is a conflict with *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, *supra*. That case involved a general agency contract for husbanding services. Bernard's services were not part of a continuing or general agency relationship, were not similar to husbanding services, and did not "end when the freight is placed at the pier." *Id.*, 815 F.2d at 664. Its services for Ingersoll's cargo continued through and after the loading on board and the issuance of the loading on

---

3 The District Court took note of cases in which this Court, *see Reid v. Fargo*, 241 U.S. 544, 545-46 (1916), and other federal courts "have traditionally exercised admiralty jurisdiction over shipper's claims against freight forwarders." (Pet. App. 53a). Congress, in regulating ocean freight forwarders, *see* 46 U.S.C. §§ 801, 841b(a); 46 C.F.R. Part. 510, has specifically found their services "'essential' for successful vessel operation." *See* 1961 U.S. Code Cong. & Ad. News, 2699, 2702, 2704. The Second Circuit took note of these cases but decided the case on the basis of the specific tasks performed by Bernard. (Pet. App. 14a).

board and the issuance of the proper written ocean contract of carriage and other shipping documents. These services were critical to the manner of, and contract by which this specific cargo would be shipped and its safe ocean journey would be assured.

There is also no conflict with the other decisions cited by Bernard. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*, involved a routine husbanding contract. *See E.S. Binnings, Inc. v. M/V Saudi Riyadh*, *supra*, 815 F.2d at 664-65. In its decision below, the Second Circuit did not rely on *Hinkens Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), to expand or distinguish *Minturn*. It merely cited it for the proposition that the character of the work is controlling.

II. This Case Is Not An Appropriate One For The Review Of The Principles of Admiralty Jurisdiction, Because There Also Was Diversity and Pendant Party Jurisdiction.

Bernard's attempt to deny any federal jurisdiction is unavailing, because there was diversity and pendant party jurisdiction. Although the courts below did not reach these issues, the existence of these alternative grounds for decision, makes this an inappropriate case to reach the constitutional question of the scope of admiralty jurisdiction.

A. Diversity Jurisdiction.

There was diversity jurisdiction, because in July 1980, at the time the underlying action was filed, Ingersoll was an Illinois business, and Bernard was a New York corporation. Official records of the New York Secretary of State (included in Respondent's Appendix hereto, "Res. App. ___"), of which this Court may take notice, Rule 201(f), Fed. R. Evid.; *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977), show that on December 7, 1925, Bernard was incorporated in New York. (Res. App. 1a). On May 3, 1982, it changed its name to Radix Group International, Inc., and on June 16, 1982, a new

J.E. Bernard & Co., Inc. was incorporated in New York. (Res. App. 2a, 3a). In public filings with the SEC, its parent stated that on October 1, 1981, it acquired Bernard and that on May 1, 1982, Bernard was reorganized into Radix.

In its Petition *as originally filed* with this Court, Bernard asserted that there was no diversity because at the time the action was filed both Ingersoll and Bernard were "incorporated under the laws of the state of Illinois." (Pet. 8, n. 1). This statement was not correct. Counsel for Ingersoll then advised counsel for Bernard that on the basis of official state records of New York and Illinois, it did not appear that Bernard had ever been incorporated in Illinois. Bernard has since inserted a correction of this misstatement so that its Petition now reads:

> "At the time the underlying action was filed both Ingersoll and Bernard had their principal places of business in Illinois." (Pet. 8, n. 1).

This new representation is also incorrect.

Official records of the Illinois Secretary of State show that on February 1, 1977, in Bernard's first application for authority to transact business in Illinois, it stated under oath that it was incorporated in New York and that its principal place of business was in New York. (Res. App. 6a). Thus, at the time of the filing of the action,[4] Bernard was a New York corporation, 28 U.S.C. § 1332(c), and there clearly was diversity.[5]

---

4 In May, 1982, Radix amended Bernard's Illinois filing to note the name change to Radix, but it still stated that New York was the principal office designated in the charter, it listed New York as one of its principal offices, and it stated the principal officers were located in New York. (Res. App. 11a, 12a). On January 2, 1987, Bernard's authority to transact business in Illinois was revoked. (Res. App. 17a).

5 In 1980, when Ingersoll filed its complaint by its Illinois counsel, it believed that Bernard was incorporated in and had its principal place of business in Illinois and it so pleaded in the complaint. However, diversity was not then an issue. If Bernard had made jurisdiction an issue before post-trial briefs so that the District Court could have reviewed the matter, there would have been discovery, and the fact that Bernard is indisputably a New York corporation would have been disclosed.

B. Pendant Party Jurisdiction

This case also meets the requirements laid down by this Court for pendant party jurisdiction over a strictly state claim.

In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-26 (1966), this Court recognized the power of the federal courts to adjudicate a state claim in a federal question case when the relationship between the claims "permits the conclusion that the entire action before the Court comprises but one constitutional 'case,' " on a "common nucleus of operative fact." The exercise of this pendant jurisdiction is within the discretion of the court, giving due consideration to "judicial economy, convenience, and fairness to litigants." *Id.*, at 726.

Gibbs involved a single plaintiff and a single defendant, but the lower court trend has been in favor of recognizing the federal power to exercise pendant party jurisdiction over defendants named *only* with respect to state claims, provided that, as here, they arise from a common nucleus of operative facts with the federal claims against the other defendants. *See Moor v. County of Alameda*, 411 U.S. 693, 714-15 (1973); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627, 629-30 (2d Cir. 1971); *Maltais v. United States*, 439 F. Supp. 540, 547-48 (N.D.N.Y. 1977); *Hipp v. United States*, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970).

In a case squarely on point, the Second Circuit has held that in an admiralty suit against a carrier for breach of the contract of carriage, the court may exercise pendant party jurisdiction over tort claims against a non-diverse terminal operator. *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

This Court has not resolved the question of the scope of pendant party jurisdiction, but has applied a case by case analysis based on the context in which its application is sought. In *Moor v. County of Alameda*, *supra*, 411 U.S. at 713-15, the Court assumed, *arguendo*, the existence of pendant party jurisdiction, but upheld the lower court's application of its

discretion not to exercise it. In *Aldinger v. Howard*, 427 U.S. 1, 16-18 (1976), the Court affirmed the denial of pendant party jurisdiction in connection with 42 U.S.C. § 1983, but it did so because of specific Congressional action excluding certain parties from the scope of § 1983 cases. The Court took care to state that a different case was presented where the grant of federal jurisdiction is exclusive, because "the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal Court may all of the claims be tried together." *Id.*, 427 U.S. at 18 (footnote omitted). *See also Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365 (1978) (no pendant jurisdiction when federal jurisdiction is based only on diversity).

Subsequent to *Aldinger*, several courts have ruled that pendant party jurisdiction should be exercised where (1) the state and the federal claim arise from a common nucleus of operative facts; (2) Congress has not expressly or by implication negated the existence of jurisdiction; and (3) considerations of judicial economy, convenience, and fairness to litigants call for the exercise of jurisdiction, taking account of the exclusivity of federal jurisdiction and the ability to obtain full relief in one Court. *DeBellas v. United States*, 542 F. Supp. 999, 1004 (S.D.N.Y. 1982) (Federal Tort Claims Act case); *accord Morse Electro Products Corp. v. S.S. Great Pearce*, 437 F. Supp. 474, 479, 483-85 (D.N.J. 1977) (admiralty action citing the Second Circuit decision in *Leather's Best, Inc. v. S.S. Mormaclynx*, *supra*).

Here, where Ingersoll's claims against all other defendants are subject to the exclusive admiralty jurisdiction granted to the federal courts, 28 U.S.C. § 1333, and there is no contrary legislative or policy reason for not also hearing the claim against Bernard, Ingersoll's claim against Bernard satisfies the most stringent standards for exercising pendant jurisdiction. Ingersoll's claims against all defendants (and the third party claims among the defendants) are all derived from a common nucleus of operative facts. Efficiency, fairness, consistency of result and completeness of relief all argue for one federal

forum. *Lykins v. Pointer*, 725 F.2d 645, 647 (11th Cir. 1984); *Boudreaux v. Puckett*, 611 F.2d 1028, 1031 (5th Cir. 1980); *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979).

Prior to its post-trial brief, Bernard raised no objection to the federal forum or to the transfer from Illinois. The conclusion is inescapable that Bernard never did so because it recognized that these claims arise in admiralty. With the case ready for decision after a long trial, it made no sense and would have been a great waste of judicial resources, for the District Court not to exercise pendant jurisdiction over Bernard.

Bernard's final contention that the exercise of pendant jurisdiction over Ingersoll's claim deprived it of a right to trial by jury is equally without merit. As the Second Circuit has held in the identical context, Bernard's failure to demand a trial by jury constituted a waiver of that right pursuant to Rule 38(d), Fed. R. Civ. P., and there is no obstacle to the exercise of pendant jurisdiction. *Leather's Best, Inc. v. S.S. Mormaclynx*, *supra*, 451 F.2d at 810-11, n.12; *see also Morse Electro Products Corp. v. S.S. Great Pearce*, *supra*, 437 F. Supp at 484. Furthermore, Bernard has nobody to blame but itself for its alleged loss of a jury trial. Had it given the District Court an early opportunity to address jurisdiction, it could have appealed to the Court's discretion under Fed. R. Civ. P. 39(b).

III. As A Matter Of Law And Of Fact, The Bill Of Lading Was Not Clean.

Bernard seeks a review of its liability for failure to secure clean bills of lading on the grounds that the courts below misinterpreted the meaning of "clean." Bernard does not explain why this is an important question of federal law for this Court to decide. It plainly is not. Furthermore, the Second Circuit's decision is consistent with numerous decisions of this Court and other circuits. The courts below did consider Bernard's evidence to support its contentions as to the meaning of a clean bill of lading and found that the record as a whole did not support Bernard's position.

The Second Circuit agreed with the District Court and held that the phrase a "clean bill of lading" is not limited to describing the condition of the goods, but "refers also to the place on a ship where cargo is to be stowed." (Pet. App. 18a). As the Second Circuit recognized (Pet. App. 19a), the cases and the commentators have long been in accord that a clean bill of lading imports stowage under desk. *The Delaware*, 81 U.S. (14 Wall) 579 (1874); *see St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janeiro*, 263 U.S. 119, 124 (1923); *The Idefjord*, 114 F.2d 262, 266 (2d Cir.), *cert. denied*, 311 U.S. 707 (1940); *Calmaquip Eng. West Hemisphere Corp. v. West Coast Carrier's Ltd.*, 650 F.2d 633, 639 (5th Cir. 1981).

Bernard seeks to avoid the force of one hundred years of case law and the views of most commentators by claiming that the courts below refused to consider its evidence of the parties' intent and the meaning of the term in the trade. This is untrue.

The District Court considered all of the evidence offered by both sides. Bernard's claims were refuted by the evidence. For example, Ingersoll's expert, an independent freight forwarder with forty years of experience, testified that the phrases "on deck" or "shipper's risk" made the bill of lading not clean because each limits the responsibility of the steamship line to the shipper. JA 1048-1 to 1049, 1061, 1069-6, 7; 1890. The *Merchant Marine Officer's Handbook*, pp. 18-26 (4th ed. 1965), in evidence (E 363), is to the same effect. For these reasons, Bernard plainly did not establish a custom in the industry to support its position.

The District Court properly held that Bernard's attempt to limit the meaning of clean was illogical:

> "The very purpose of clean on board bills of lading is to provide the shipper with documentation that the damage to his goods, if any occurs, cannot be attributed to him. In short, its purpose is to relieve the shipper of risk during the voyage. The bills of lading in this case maintain

> liability on Ingersoll throughout the voyage. Such bills cannot be clean."

(Pet. App. 50a). Whatever Bernard thought about the effect of "on deck," it had to know that the "shipper's risk notation rendered the bills of lading unclean." (Pet. App. 51a).[6]

---

6 The INCO terms Bernard refers to were not part of *Bernard's* contract with Ingersoll. In any event, Bernard should have known what constitutes a clean bill of lading (Pet. App. 51a), and the INCO terms would not modify controlling precedents. (Pet. App. 18a, n.6). For the reasons stated by the District Court, a common sense analysis of the INCO definition shows it is consistent with those precedents. Even Bernard, which thought this cargo was covered by a bank letter of credit, JA 567, 575-76, knew that under Article 22a of INCO terms, the banks would not accept Ingersoll's bill of lading because it was marked "on deck."

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
December 31, 1987

JOHN DOAR
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorney for Respondent
The Ingersoll Milling Machine Company

Of Counsel:

MICHAEL S. DEVORKIN
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

APPENDIX

BEST AVAILABLE COPY

STATE OF NEW YORK,
DEPARTMENT OF STATE, ss:

I HEREBY CERTIFY, that I have made diligent examination of the index of corporation papers filed in this Department for a certificate, order or record of a dissolution of RADIX GROUP INTERNATIONAL, INC. the certificate of incorporation of which corporation was filed December 7, 1925, under the name of J. E. BERNARD & CO. INC., fixing the duration as perpetual.

I further certify that I find the following amendments:

Certificate of Designation
Filed January 8, 1935

Certificate of Amendment of
Certificate of Incorporation
Filed January 29, 1945

Certificate of Amendment of
Certificate of Incorporation
Filed November 23, 1976

Certificate of Change
Filed November 18, 1980

Certificate of Merger of
FREEDMAN & SLATER, INC.
FREEDMAN & SLATER AIR CARGO CORP. and
NEWCO INTERNATIONAL TRANSPORTATION, INC.
with
J. E. BERNARD & CO. INC.
Filed April 28, 1982

Certificate of Merger of
WOLF & GERBER, INC.
with
J. E. BERNARD & CO. INC.
Filed April 28, 1982

Certificate of Amendment of
J. E. BERNARD & CO. INC.
changing name to
RADIX GROUP INTERNATIONAL, INC.
Filed May 3, 1982

and that upon such examination, I find no such certificate, order or record, and that so far as indicated by the records of this Department, such corporation is a subsisting corporation.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this 13th day of December one thousand nine hundred and eighty-five.

/s/ GAIL SHAFFER
Secretary of State

STATE OF NEW YORK,
DEPARTMENT OF STATE, ss:

I HEREBY CERTIFY, that I have made diligent examination of the index of corporation papers filed in this Department for a certificate, order or record of a dissolution of J. E. BERNARD & CO., INC., the certificate of incorporation of which corporation was filed June 16, 1982, with perpetual duration, and that upon such examination, I find no such certificate, order or record, and that so far as indicated by the records of this Department, such corporation is a subsisting corporation.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this 13th day of December one thousand nine hundred and eighty-five.

/s/ GAIL SHAFFER
Secretary of State

File Number 5108-987-1

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, JIM EDGAR, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of the Certificate of Authority and all Amendments thereto, to date, including the latest Change of Registered Agent or Registered Office of RADIX GROUP INTERNATIONAL, INC.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 23rd day of December A.D., 1987.

/s/ JIM EDGAR
Secretary of State

[SEAL]

Certificate Number 32387

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, J. E. BERNARD & CO. INC., incorporated under the laws of the State of New York has filed in the Office of the Secretary of State duly authenticated evidence of its incorporation and an application for Certificate of Authority to transact business in this State, as provided by "THE BUSINESS CORPORATION ACT" of Illinois, in force July 13, A.D., 1933.

NOW THEREFORE, I, ALAN J. DIXON, Secretary of State of the State of Illinois, by virtue of the powers and duties vested in me by law, do hereby issue this Certificate of Authority and attach thereto a copy of the application of the aforesaid corporation.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, done at the City of Springfield this 10th day of February A.D. 1977 and of the Independence of the United States the two hundred and 1st.

/s/ ALAN J. DIXON
Secretary of State

[SEAL]

Form BCA—106 or 114
(File in Duplicate)

Date Paid		*2-10-77*
License Fee	$	*50.00*
Franchise Tax	$	*141.67*
Filing Fee	$	*75.00*
Penalty	$	*26.94*
Clerk		*293.61*

APPLICATION FOR CERTIFICATE OF AUTHORITY
OF FOREIGN CORPORATION

566 25

February 1, 1977

To ALAN J. DIXON, Secretary of State, Springfield, Illinois:

J. E. BERNARD & CO. INC., a corporation organized and existing under and by virtue of the laws of the State of New York hereby makes application for a certificate of authority to transact business in the State of Illinois and submits the following application pursuant to "The Business Corporation Act," of Illinois:

First—The above corporation was duly incorporated under the laws of the State of New York on the 7th day of December, A.D. 1925, for a perpetual term.

Second—The location of the principal office as designated in the charter is New York, N.Y. The locations of its principal places of business are: 90 West Street, New York, N.Y. 10006.

Third—The address of the proposed registered office of the State of Illinois will be located at 39 S. La Salle Street in the city of Chicago 60603, County of Cook, and the name of its proposed registered agent in this State at such address is: GEORGE HUGH BARNARD.

Fourth—The corporation is transacting business and qualified under the foreign corporation laws of the following states and countries other than Illinois: New York

Fifth—The names of its officers and directors and their addresses are as follows:

Name	*City and State*	*Street and No.*
President, Irwin Wortman	New York, N.Y.	90 West Street
Secretary, George Hugh Barnard	Chicago, Ill.	39 S. La Salle St.
Director, Bruce A. Wilson	Elk Grove Village, Ill.	2150 Landmeier Rd.
Director, Edward L. Jordan	Elk Grove Village, Ill.	2150 Landmeier Rd.
Director, Morton John Barnard	Chicago, Ill.	39 S. La Salle St.
Director, George Hugh Barnard	Chicago, Ill.	39 S. La Salle St.

Sixth—The purpose or purposes for which it was organized which it proposes to pursue in the transaction of business in this State are:

Customs House Broker, Freight Forwarding, Transportation of Goods, Import and Export Trade (but not including operation of railroads).

Seventh—The number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
Common		1,000	Without par value

Eighth—The number of its issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
Common		100	Without par value

(NOTE: "Issued" shares, as used above, include (1) "outstanding" shares, and (2) all shares which have been issued and repurchased or redeemed by the corporation, but not cancelled of record in the home State.)

Ninth—The amount of stated capital and the amount of paid in surplus of the corporation as defined by "The Business Corporation Act" of Illinois, is:

The corporation elects to pay its license fees and franchise Tax on the basis of its total stated capital and paid-in-surplus

Stated Capital...$100,000.00

(Note: If no Paid in Surplus, insert "None") Paid in Surplus .$ NONE

Total.....$100,000.00

* * * * *

[Articles Tenth through Thirteenth omitted as they are blank on application]

Fourteenth—INTERROGATORIES:

* * * * *

[Interrogatories (a) through (f) omitted as they are blank on application]

(g) Is the corporation transacting business in this State at this time? *Yes*

(h) If your answer is in the affirmative, state the exact date on which it commenced to transact business in Illinois: *Feb. 1, 1977*

IN WITNESS WHEREOF, the undersigned corporation has caused this report to be executed in its name by its Vice President attested by its _____ Secretary, this 1st day of February, A.D. 1977.

J. E. BERNARD & CO., INC.
(Exact Corporate Title)

[SEAL]

By /s/ EDWARD L. JORDAN
Vice President

Attest:
/s/ GEORGE HUGH BARNARD
Secretary

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

I, LUCILLE CAPRA, a Notary Public, do hereby certify that on the 1st day of February, A.D. 1977, personally appeared before me EDWARD L. JORDAN, who declares that he is Vice President of the corporation, executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

/s/ LUCILLE CAPRA
Notary Public

[SEAL]

[Filed February 10, 1987]

File Number 5108 987 1

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN THIS STATE, duly signed and verified of RADIX GROUP INTERNATIONAL, INC., incorporated under the laws of the State of New York has been filed in the office of the Secretary of State as provided by "The Business Corporation Act" of Illinois in force July 13, A.D., 1933.

NOW THEREFORE, I, JIM EDGAR, Secretary of State of the State of Illinois by virtue of the powers vested in me by law, do hereby issue this certificate and attach thereto a copy of the Application of the aforesaid corporation.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, done at the City of Springfield this 18th day of May A.D. 1982 and of the Independence of the United States the two hundred and 6th.

/s/ JIM EDGAR
Secretary of State

[SEAL]

5108-987-1

Form BCA—106 or 114	Date Paid	*5-18-82*
(File in Duplicate)	License Fee	$
	Franchise Tax	$
	Filing Fee	$
	Penalty	$ *25.00*
	Clerk	*BV*

APPLICATION FOR AMENDED

_____, 19____

To ALAN J. DIXON, Secretary of State, Springfield, Illinois:

RADIX GROUP INTERNATIONAL, INC. (formerly J.E. Bernard & Co. Inc.), a corporation organized and existing under and by virtue of the laws of the State of New York hereby makes application for an amended certificate of authority to transact business in the State of Illinois and submits the following application pursuant to "The Business Corporation Act," of Illinois:

First—The above corporation was duly incorporated under the laws of the State of New York on the seventh day of December, A.D. 1925, for a Perpetual duration.

Second—The location of the principal office as designated in the charter is New York, N.Y. The locations of its principal places of business are: 152 William Street, New York, N.Y.; 1111 Nicholas Boulevard, Elk Grove, Illinois 60007.

Third—The address of the proposed registered office of the State of Illinois will be located at 39 South LaSalle Street in the city of Chicago (60606), County of Cook, and the name of its proposed registered agent in this State at such address is: George Hugh Barnard.

Fourth—The corporation is transacting business and qualified under the foreign corporation laws of the following states and countries other than Illinois:

Arizona, California, Florida

Fifth—The names of its officers and directors and their addresses are as follows:

Name	*Office*	*Address*	*Date of Taking Office*
Pierre L. Schoenheimer	Chairman	230 Park Avenue New York, N.Y.	April 15, 1982
John Radziwill	President & Director	156 William Street New York, N.Y.	April 15, 1982
Don S. Friedkin	Vice Pres., Sec'y & Director	230 Park Avenue New York, N.Y.	April 15, 1982
Matthew Sheppard	Vice Pres. & Treas.	156 William Street New York, N.Y.	April 15, 1982
Patrick H. Canary	Director	1111 Nicholas Blvd. Elk Grove, Illinois	April 15, 1982
Joseph Weinberg	Director	8728 Aviation Blvd. Inglewood, Cal. 90301	April 15, 1982

Sixth—The purpose or purposes for which it was organized which it proposes to pursue in the transaction of business in this State are:

Customs House Broker, Freight Forwarding, Transportation of Goods, and any other lawful purpose for which a corporation may be organized in the State of Illinois.

Seventh—The number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
common	N/A	1000	No par value

Eighth—The number of its issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
common	N/A	100	No par value

(NOTE: "Issued" shares, as used above, include (1) "outstanding" shares, and (2) all shares which have been issued and repurchased or redeemed by the corporation, but not cancelled of record in the home State.)

Ninth—The amount of stated capital and the amount of paid in surplus of the corporation as defined by "The Business Corporation Act" of Illinois, is:

Stated Capital...$100,000

(Note: If no Paid in Surplus, insert "None") Paid in Surplus..$ none

Total.....$100,000

* * * * *

[Articles Tenth through Fourteenth omitted as they are blank on application]

IN WITNESS WHEREOF, the undersigned corporation has caused this report to be executed in its name by its Vice President attested by its _____ Secretary, this 1st day of May, A.D. 1982.

RADIX GROUP INTERNATIONAL, INC.
(Exact Corporate Title)

By /s/ M.P. SHEPPARD
Vice President

[SEAL]

Attest: /s/ [Illegible]
Secretary or Assistant Secretary

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.

I, PETER J. BERNBAUM, a Notary Public, do hereby certify that on the 1st day of May, A.D. 1982, personally appeared before me MATTHEW P. SHEPPARD, who declares that he is Vice President of the corporation, executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

/s/ PETER J. BERNBAUM
Notary Public

PETER JAY BERNBAUM
Notary Public, State of New York
No. 30-4618346
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1983

[SEAL]

[FILED MAY 18, 1982]

File #5108-987-1

BCA 5.10/5.20 (*Rev. Jul. 1984*)
Submit in Duplicate

Remit payment in Check or Money Order, payable to "Secretary of State".
DO NOT SEND CASH!

This Space For Use By Secretary of State

Date

Filing Fee $5.00

Clerk

Secretary of State
State of Illinois

STATEMENT OF CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

Pursuant to the provisions of "The Business Corporation Act of 1983", the undersigned corporation hereby submits the following statement.

1. The name of the corporation is RADIX GROUP INTERNATIONAL, INC.
2. The State or Country of incorporation is New York
3. The name and address of its registered agent and its registered office as they appear on the records of the office of the Secretary of State (*Before Change*) are:

Registered Agent No Change
First Name *Middle Name* *Last Name*

Registered Office 222 West Adams Street
Number *Street* *Suite No. (A P.O. Box alone is not acceptable)*

Chicago 60606 Cook
City *Zip Code* *County*

4. The name and address of its registered agent and its registered office shall be (*After All Changes Herein Reported*):

Registered Agent The Prentice-Hall Corporation System, Inc.
First Name *Middle Name* *Last Name*

Registered Office 33 North LaSalle Street
Number *Street* *Suite No. (A P.O. Box alone is not acceptable)*

Chicago 60602 Cook
City *Zip Code* *County*

5. The address of the registered office and the address of the business office of the registered agent, as changed, will be identical.

6. The above change was authorized by: (*"X" one box only*)

a. ☐ By resolution duly adopted by the board of directors. *(Note 5)*

b. ☒ By action of the registered agent. *(Note 6)*

(If authorized by the board of directors, sign here. See Note 5)

* * * * *

The undersigned, under penalties of perjury, affirms that the facts stated herein are true.

The Prentice-Hall Corporation System, Inc.
By: /s/ STEPHEN W. CRAIG
(Signature of Registered Agent of Record)
Stephen W. Craig, Vice-President

Dated March 3, 1986

[FILED FEBRUARY 28, 1986 SECRETARY OF STATE]

File Number 5281-086-8

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, JIM EDGAR, Secretary of State of the State of Illinois, do hereby certify that J. E. BERNARD & CO., INC., incorporated in the State of New York and licensed to transact business in this State August 9, 1982, corporation was Revoked by the Secretary of State on January 2, 1987, for failure to file an annual report and failure to pay franchise taxes, for the year 1986, thereby terminating their existence in the State of Illinois.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 23rd day of December A.D., 1987.

/s/ JIM EDGAR
Secretary of State

[SEAL]